# Perbadanan Kemajuan Negeri Kedah v CBH Rubber Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01(NCVC)(W)-10–01 OF 2014
ZAHARAH IBRAHIM, AZAHAR MOHAMED AND MOHAMAD ARIFF JJCA
24 FEBRUARY 2016

*Contract — Specific performance — Proposal — Company proposed to take over operations of factory belonging to defendant — Agreements approved by members of defendant but defendant decided not to continue with proposal — Whether there was binding contract between parties — Whether agreements agreed by members of defendant enforceable*

The respondent ('the plaintiff') was a private limited company involved in rubber-based products and activities while the appellant ('the defendant') was a statutory body incorporated pursuant to s 3 of the Kedah Development Enactment No 5 of 1965. The plaintiff and its majority shareholder, Asian-Hopes (HL Ltd) ('Asian-Hopes') had prepared a proposal paper ('the proposal') to take over the operations of the factory belonging to the defendant. The factory was operated by Kilang Hivea Sdn Bhd, a company 100% owned by the defendant. The defendant informed the plaintiff via a letter dated 22 November 2011 that the proposal had been approved by the members of the corporation meeting on 25 September 2011. A series of discussions were involved and there were amendments made to the said agreements. The defendant later wrote to the plaintiff that the defendant's board of directors decided not to continue with the proposal. The plaintiff then proceeded to file a claim at the High Court against the defendant on the purported premise that there was a concluded contract between them. The plaintiff claimed for specific performance of the agreements; special damages; and damages for loss of profits. In the alternative to specific performance, the plaintiff sought a declaration ('the declaration') that it was entitled to the enforcement of the agreements approved by members of the defendant. The judicial commissioner ('the JC') allowed the declaration but also made an express finding of fact that there had not, in actuality, been an agreement as at 25 September 2011. The JC further allowed the plaintiff's alternative relief in paras 33(b) and 33(e) on general damages to be assessed and para 33(f) on interests and costs. Hence, the present appeal.

**Held**, allowing the appeal with costs; setting aside the order of the High Court:

(1) The decision of the JC in allowing the plaintiff's alternative relief in paras 33(b) raised some vexed issues. The JC granted the alternative relief

which was pleaded in para 33(b) as a declaration that the plaintiff had a right to enforce the agreements which were approved by the defendant's members on 25 September 2011. The JC granted the declaration but in her written judgment she has made a firm and definite finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement (see para 21).

(2) The letter dated 22 November 2011 explicitly stated that 'your proposal was approved' and 'subject to the finalisation of which it will be vetted and endorsed by the Kedah State Legal Advisor'. A binding contract was not reached between the plaintiff and the defendant, which was duly approved by the defendant's members on 25 September 2011. Therefore, it was baffling as to how the JC could still make the declaration order (see para 22).

(3) The JC ought to have considered that in view of her finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement, there was therefore no legal basis at all to grant a declaration that the plaintiff has a right to enforce the agreement which were approved by the defendant's members on 25 September 2011. This indicated a lack of judicial appreciation on the part of the JC warranting appellate intervention (see para 23).

**[Bahasa Malaysia summary**

Responden ('plaintif') adalah syarikat sendirian berhad terlibat dalam barangan berdasarkan getah dan aktiviti-aktiviti sementara perayu ('defendan') adalah badan statutori yang ditubuhkan berikutan s 3 Enakmen Pembangunan Kedah No 5 tahun 1965. Plaintif dan pemegang saham majoriti, Asian-Hopes (HL Ltd) ('Asian-Hopes') telah menyediakan kertas cadangan ('cadangan') untuk mengambil alih operasi kilang yang dimiliki oleh defendan. Kilang tersebut dikendalikan oleh Kilang Hivea Sdn Bhd, syarikat 100% yang dimiliki oleh defendan. Defendan memberitahu plaintif melalui surat bertarikh 22 November 2011 bahawa cadangan telah diluluskan di mesyuarat ahli-ahli perbadanan pada 25 September 2011. Perbincangan berturut-turut adalah terlibat dan terdapat pindaan yang dibuat kepada perjanjian tersebut. Defendan kemudiannya menulis kepada plaintif bahawa lembaga pengarah memutuskan untuk tidak meneruskan dengan cadangan tersebut. Plaintif kemudiannya meneruskan untuk memfailkan tuntutan di Mahkamah Tinggi terhadap defendan atas asas bahawa terdapat kontrak yang disimpulkan di antara mereka. Plaintif menuntut pelaksanaan spesifik perjanjian-perjanjian; ganti rugi khas; dan ganti rugi bagi kehilangan keuntungan. Alternatif kepada pelaksanaan spesifik, plaintif memohon perisytiharan ('perisytiharan') bahawa ia berhak kepada pelaksanaan perjanjian-perjanjian yang diluluskan oleh ahli-ahli defendan. Pesuruhjaya kehakiman ('PK') membenarkan perisytiharan tersebut tetapi juga membuat dapatan nyata terhadap fakta bahawa sebenarnya tidak terdapat perjanjian setakat 25 September 2011. PK selanjutnya

membenarkan relief alternatif plaintif dalam perenggan 33(b) dan 33(e) atas ganti rugi am yang ditaksirkan dan perenggan 33(f) atas faedah dan kos. Maka, rayuan ini.

**Diputuskan**, membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi:

(1) Keputusan PK dalam membenarkan relief alternatif plaintif dalam perenggan 33(b) membangkitkan beberapa isu yang tidak puas hati. PK memberikan relief alternatif yang mana diplidkan dalam perenggan 33(b) sebagai perisytiharan bahawa plaintif mempunyai hak untuk menguatkuasakan perjanjian-perjanjian yang mana diluluskan oleh ahli-ahli defendan pada 25 September 2011. PK memberikan perisytiharan tetapi dalam penghakiman bertulisnya dia membuat dapatan yang kukuh dan betul bahawa ahli-ahli defendan pada 25 September 2011 hanya meluluskan cadangan tersebut dan bukan mana-mana perjanjian (lihat perenggan 21).

(2) Surat bertarikh 22 November 2011 secara jelas menyatakan bahawa 'your proposal was approved' dan 'subject to the finalisation of which it will be vetted and endorsed by the Kedah State Legal Advisor'. Kontrak mengikat tidak dicapai di antara plaintif dan defendan, yang mana diluluskan dengan wajar oleh ahli-ahli defendan pada 25 September 2011. Oleh itu, ia adalah membingungkan bagaimana PK masih boleh membuat perintah perisytiharan tersebut (lihat perenggan 22).

(3) PK patut mempertimbangkan bahawa mengambil kira dapatannya bahawa ahli-ahli defendan pada 25 September 2011 hanya meluluskan cadangan tersebut dan bukan mana-mana perjanjian, dengan itu langsung tidak terdapat asas undang-undang untuk memberikan perisytiharan bahawa plaintif mempunyai hak untuk menguatkuasakan perjanjian tersebut yang mana diluluskan oleh ahli-ahli defendan pada 25 September 2011. Ini menunjukkan kekurangan penilaian kehakiman oleh pihak PK mewajarkan campur tangan mahkamah rayuan (lihat perenggan 23). ]

**Notes**

For cases on specific performance in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6923–7011.

**Cases referred to**

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng* [2005] 2 MLJ 1, FC (refd)

**Legislation referred to**

Kedah Development Corporation Enactment No 5 of 1965 s 3

**Appeal from**: Suit No 22NCVC-345–12 of 2012 (High Court, Alor Setar)

*Shahul Hameed bin Amiruddin (Natalia Izra bt Nasaruddin with him) (Zul Rafique & Partners) for the appellant.*
*P Latsmanan (Khor Gaik Thiam & Latsmanan) for the respondent.*

**Azahar Mohamed JCA (delivering judgment of the court):**

**[1]** This was an appeal by the appellant, Perbadanan Kemajuan Negeri Kedah ('the defendant in the High Court') against the whole of the decision of the learned judicial commissioner ('the JC') of the High Court at Alor Setar whereby the learned JC allowed the claim by the respondent, CBH Rubber Sdn Bhd ('the plaintiff in the High Court') against the appellant and made, among others, the following orders:

(a) a declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011; and

(b) the defendant is to pay to the plaintiff general damages that are to be assessed by the court.

**[2]** We heard the appeal, wherein at the conclusion of the hearing we unanimously allowed it with costs. We now give our reasons for so deciding. We shall be referring to parties in this judgment in their respective capacity in the High Court.

**[3]** The plaintiff is a private limited company. Prior to 21 September 2011, the plaintiff was formerly known as 'Newterm Realty Sdn Bhd'. The plaintiff was incorporated, inter alia, for the purpose of dealing in rubber based products and activities.

**[4]** The defendant is a statutory body incorporated pursuant to s 3 of the Kedah Development Corporation Enactment No 5 of 1965 ('the Enactment'). The defendant's duties as set out in s 11 of the Enactment are amongst others, to promote or undertake any residential, industrial, agricultural and commercial development of areas in the state of Kedah designated for such purpose; and to promote or undertake any kind of business, trading and commercial enterprises including agricultural, industrial, housing and mining enterprises in the state of Kedah.

**[5]** The defendant at all material times, was the registered proprietor of a piece of land measuring approximately 52 acres ('the land') together with a

factory plant erected thereon known as Kilang Hevea Bukit Perak situated in Padang Lembu, Gurun, Kedah ('the factory') to process, inter alia, natural rubber.

**[6]** At all material times, the factory was operated and managed by a company known as Kilang Hevea Bukit Perak Sdn Bhd, ('Kilang Hevea') which was a company 100% owned by the defendant.

**[7]** A proposal paper ('the proposal') dated 8 June 2011 to take over the operations of the factory was prepared by the plaintiff and Asian-Hopes (HL Ltd) ('Asian-Hopes'). Asian-Hopes was the majority shareholder in the plaintiff company.

**[8]** According to the proposal, the plaintiff and Asian-Hopes would initially invest a sum of RM60m and a long-term investment of RM600m by way of a long-term investment in respect of the take-over of the factory. The plaintiff and Asian-Hopes would also source the market for the finished rubber products. Under the proposal, the plaintiff would also pay the defendant RM80 per ton output of finished product produced; RM20 per ton for the quantity of finished products sold to buyers using the factory's licensed facilities; RM20 per ton for the quantity of finished products sold to buyers using the factory's licensed facilities; RM20 per ton for the quantity of finished products purchased directly from outside suppliers and sold to buyers using the factory's licensed facilities; and a guaranteed annual minimum amount of RM1.2m in the event the targeted output failed to reach the projected volume.

**[9]** By way of its letter dated 24 July 2011, the defendant invited the plaintiff to provide a presentation of the proposal to the defendant's executive committee. The presentation was held on 25 July 2011. Upon the defendant's request, a working visit to Kun Lun Tyre Co Ltd in Xia Jiang China from 10 October 2011 to 14 October 2011 was arranged. The purpose of the visit was to enable the defendant to assess the viability of the proposal.

**[10]** As at 20 November 2011, the plaintiff had only forwarded to the defendant one draft of the investment agreement and sub-lease agreement that were to be entered into between Kilang Hevea and the plaintiff.

**[11]** At this point, it is important to note that by way of a letter dated 22 November 2011, the defendant acknowledged receipt of the draft investment agreement and draft sub lease agreement that were to be entered into between Kilang Hevea and the plaintiff. The defendant's letter dated 22 November 2011 reads:

The Managing Director

CBH Rubber Sdn Bhd

68, Kompleks Alor Malai

Bt 2 Jalan Langgar

05460 Alor Setar

Kedah Darul Aman.

Dear Sir,

PROPOSAL TO LEASE THE RUBBER FACTORY IN

PADANG LEMBU

This is to acknowledge that we have received the draft agreement on 20th of November 2011, pertaining to the above subject. Please take note that the draft agreement has been forwarded to our lawyers for their immediate perusal and we will hand back to you once it is ready for further discussion and finalization.

We are also please to inform you that your proposal was approved during our Members of the Corporation meeting on the 25th September 2011 and subsequently attested on the 21st November 2011. The approval is subject to the finalization of the said agreement of which, it will have to be vetted and endorsed by the Kedah State Legal Advisor.

The timeline to finalize the agreement with your cooperation is set on the 15th December 2011, and should be formalized by the 20th of December. Then it is anticipated that the parties concerned could occupy the premises by the 1st January 2012.

PKNK is currently making the necessary arrangements to facilitate the transfer and if all goes well, we will be able to commence the operations.

Thank you. Yours faithfully,

PERBADANAN KEMAJUAN NEGERI KEDAH

(HAJI MUSTAFAR BIN AHMAD, SDK, AMK, BCK)

Financial Controller

For Chief Executive

**[12]** What was stated in the above letter formed one of the contentious issues between the parties, about which more will be said at a later stage of this judgment.

**[13]** Between 22 January 2012 until 12 March 2012, the plaintiff and the defendant were still in the midst of discussing the proposal. In connection to this, several draft agreements were produced by and to both parties for perusal and that a number of salient terms were being amended several times.

**[14]** The dispute in the present case arose when by way of a letter dated 12 March 2012; the defendant informed the plaintiff that the defendant's board of directors had decided not to continue with the proposal. The letter reads:

> Pengarah
>
> CBH Rubber Sdn Bhd
>
> No 68, Kompleks Alor Malai
>
> Bt 2, Jalan Langgar
>
> 05460 Alor Setar
>
> Kedah Darul Aman.
>
> Tuan,
>
> PROJEK CADANGAN USAHASAMA KILANG HEVEA
>
> BUKIT PERAK
>
> Saya dengan hormatnya ingin merujuk kepada perkara di atas. Surat tuan bil Rujukan CBH/KDH/PKNK 20120211/0003 bertarikh 11 Februari 2012 adalah berkaitan.
>
> Dukacita dimakumkan bahawa Mesyuarat Ahli-Ahli Lembaga Pengarah PKNK pada 25 Februari 2012 telah membuat keputusan untuk tidak meneruskan cadangan usahasama dan penyewaan Kilang Hevea Bukit Perak kepada pihak tuan. Pihak Perbadanan ingin merakamkan penghargaan ke atas minat pihak tuan untuk menjalinkan kerjasama dengan pihak Perbadanan ini.
>
> Sekian, terima kasih.
>
> 'BERKHIDMAT UNTUK NEGARA'
>
> Dengan hormatnya,
>
> PERBADANAN KEMAJUAN NEGERl KEDAH
>
> (DATO' HJ ABDUL RAHMAN IBRAHIM, DSDK, AMK, BCK)
>
> Ketua Eksekutif

**[15]** This then led the plaintiff to commence the present action against the defendant by filing a writ of summons and the statement of claim on 28 December 2012. The plaintiff initiated the action against the defendant on the purported premise that there was a concluded contract between the parties herein.

**[16]** The reliefs sought by the plaintiff, among others, are as follows:

> 33. Maka Plaintif menuntut daripada Defenden di bawah Seksyen 21(3) Akta

Spesifik Relif, 1950 dan/atau 'inherent jurisdiction of the Court' Perintah/relif seperti berikut:

(a) Defenden menandatangani dan melaksanakan secara spesifik Perjanjian-perjanjian diantara Plaintif dan Defenden yang telahpun diluluskan oleh Ahli-ahli Defenden seperti berikut:

(i) Perjanjian Penyewaan;

(ii) Perjanjian Pelaburan;

(iii) Perjanjian Pengurusan/Pentadbiran.

(b) DAN/ATAU Suatu Deklarasi bahawa Plaintif berhak kepada perlaksanaan Perjanjian-perjanjian yang diluluskan oleh Ahli-ahli Defenden pada 25/09/2011;

(c) Defenden membayar gantirugi khas kepada Plaintif sebanyak RM100,000;

(d) Defenden membayar Plaintif kehilangan keuntungan ('loss of profits') sejumlah RM28,800,000 berdasarkan:

(i) Keluaran minima ('finished products') (SMR) 1,000 tan sebulan;

(ii) Margin keuntungan bersih RM650 se tan (berdasarkan harga kawalan Lembaga Getah Malaysia);

(iii) Maka keuntungan bulanan RM1,000 x RM650=RM650,000;

(iv) Maka keuntungan bagi 36 bulan RM650,000x36=RM23,400,000.

(e) ATAU Gantirugi am ditaksirkan oleh Mahkamah;

(f) Faedah.

**[17]** The plaintiff's claim was essentially for specific performance of agreements, special damages and damages for loss of profits. In the alternative to specific performance, the plaintiff sought a declaration that it was entitled to the enforcement of agreements approved by members of the defendant on 25 September 2011. In the main, the plaintiff anchored its claim against the defendant on the purported approval by the defendant's members of corporation at a meeting on 25 September 2011 as disclosed in the defendant's letter dated 22 November 2011, which we have reproduced earlier in the judgment.

**[18]** The nub of the defendant's defence was that there had never been a binding contract reached between the plaintiff and the defendant. Hence, the principal issue for determination before the learned JC was whether there were concluded agreements between the parties to which the defendant asserted that parties were still in the midst of negotiations.

**[19]** Before us, the principal argument raised by learned counsel for the defendant was that the learned JC had made a fundamental error in allowing a declaration when the same learned JC had also made an express finding of fact (in the grounds of judgment) that there had not in actuality been an agreement as at 25 September 2011. We found there was much force in this argument.

**[20]** As we have indicated earlier, the learned JC allowed the plaintiff's claim. The learned JC concluded that a binding contract had been reached between the plaintiff and the defendant. On the reliefs, the learned JC said that the plaintiff had sought specific performance of the agreements or in the alternative a declaration that it was entitled to the enforcement of the agreements. The learned JC was inclined to grant the alternative relief since the defendant had through DW2 stated that if it continued with the proposal it would suffer losses. The learned JC therefore allowed the plaintiff's alternative relief in para 33(b), para 33(e) on general damages to be assessed, and para 33(f) on interests and costs of RM25,000.

**[21]** In our considered view, the decision of the learned JC in allowing the plaintiff's alternative relief in para 33(b) raised some vexed issues. On this, we have the following observations. It is relevant to note that the learned JC granted the alternative relief which was pleaded in para 33(b) of the statement of claim as follows: 'Suatu deklarasi bahawa plaintif berhak kepada perlaksanaan perjanjian-perjanjian yang diluluskan oleh ahli-ahli defenden pada 25 September 2011' ('A declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011'). It is important to note that the learned JC granted the declaration although in her written judgment she had made a firm and definite finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement as can be seen in para 16 of the judgment.

**[22]** In this regard, it is relevant to note that the letter dated 22 November 2011, with the necessary emphasis, explicitly stated, that 'your proposal was approved' and 'subject to the finalisation of which it will have to be vetted and endorsed by the Kedah State Legal Advisor'. It is plain for us to see from a reading of the letter that there had never been a binding contract reached between the plaintiff and the defendant, which was duly approved by the defendant's members on 25 September 2011. Therefore, it is baffling as to how the learned JC could still made the declaration order.

**[23]** The learned JC ought to have considered that in view of her finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement, there was therefore no legal basis at all to grant a 'declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011'. This indicates

a lack of judicial appreciation on the part of the learned JC warranting appellate intervention (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng* [2005] 2 MLJ 1).

**[24]** It is for these reasons that we had allowed this appeal with costs of RM35,000 in favour off the defendant. The deposit was to be refunded to the defendant. We had accordingly set aside the order of the learned JC.

*Appeal allowed with costs; order of the High Court set aside.*

Reported by Afiq Mohamad